No. 91-871

In The

# Supreme Court of the United States

October Term, 1992

BATH IRON WORKS CORPORATION and COMMERCIAL UNION INSURANCE COMPANIES,

*Petitioners,*

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## REPLY BRIEF FOR PETITIONERS

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## PETITIONERS' ARGUMENT IN REPLY

### 1. The Benefits Review Board Has Abandoned Its "Hybrid" Approach and Now Agrees with Petitioners.

The Employee devotes his entire brief to a defense of the Board's "hybrid" interpretation of the statutory scheme at issue. The Board, as noted in the briefs previously filed, held in this and other cases that hearing loss benefits for retirees are initially allowed under the "retiree amendments", including §908(c)(23) and §910(i), but that a lump sum benefit is calculated under §908(c)(13), which is the scheduled provision that governs all other claims for hearing loss.

However, on April 29, 1992, the Board elected to "revisit" this issue. In *Harms v. Stevedoring Services of America*, 25 BRBS 375, 1992 WL 110691 (April 29, 1992), the Board *agreed* with the Fifth and Eleventh Circuits that, since §910(i) *is* applicable to a retiree's hearing loss claim, the average weekly wage must be determined under §910(d)(2) and compensation paid under §908(c)(23). Consequently, there remains *no* authority for the position advanced by the Employee.[1]

The Board aligned itself with the Fifth and Eleventh Circuits rather than the First Circuit for two reasons. One, the Board found no evidence that Congress intended to distinguish hearing loss from other occupational diseases.

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[1] That §908(c)(13) does not always favor the employee is evident from *Harms*, where the employee argued that §908(c)(23) should apply while the Employer submitted that §908(c)(13) should govern.

Two, it noted that other occupational diseases including asbestosis may cause symptomatology prior to retirement, and that the mere onset of symptoms does not give rise to the "time of injury" under the Act. Rather, it is the employee's awareness of the relationship between the disease, employment and disability that defines the "time of injury".

Indeed, a worker exposed to asbestos may demonstrate symptoms and disability before retirement, but if he is not aware of that disability and its work-relatedness until after retirement, his "time of injury" follows retirement under §910(i). It is not possible to distinguish this situation from a case such as Mr. Brown's where a compensable hearing loss worsens after retirement. At the very least, Congress did not attempt to make such a distinction, even if one could be said to exist.

For these reasons, the Board concluded as follows:

> Given these considerations, we believe that the reasoning of the Fifth and Eleventh Circuits in *Ingalls Shipbuilding* and *Sowell* is more compelling than that of *Bath Iron*. We therefore continue to hold that hearing loss is an occupational disease covered by Section 10(i). Moreover, having reached this conclusion, we have reconsidered our decision in *Machado* and now agree with *Ingalls Shipbuilding* that the language of the statute requires application of Section 8(c)(23) to voluntary retirees suffering occupational diseases, including those with hearing losses. Accordingly, the decision in *Machado* is hereby overruled to the extent it holds that retirees with hearing losses should be compensated under Section 8(c)(13).



While this Court has confirmed that the Board is entitled to no special deference, *Potomac Elec. Power Co. v. Director, O.W.C.P.*, 449 U.S. 268, 278 n. 18, 101 S.Ct. 509, 514-15 n. 18 (1980), this Court should not overlook the fact that the First Circuit now stands alone in holding that §908(c)(13) rather than §908(c)(23) governs hearing loss claims submitted by retirees.

**2. Section 910(i) Revisited.**

The statutory analysis required in this case returns again and again to the meaning of §910(i) because, by nearly all accounts, *if* §910(i) applies then so too does §908(c)(23). The legislative history behind the 1984 "retiree amendments" has been thoroughly examined[2] and the statute as a whole read and re-read. Petitioners submit that a final examination of the four corners of §910(i) proves their case and disproves the Director's. Section 910(i) is again reproduced as follows:

> (i) For purposes of this section with respect to a claim for compensation for death or *disability* due to an occupational disease which does not immediately result in death or *disability*, the

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[2] The Director submits that Senator Hatch's reference to *Redick v. Bethlehem Steel Corporation*, 16 BRBS 155 (1984) should be discounted because (1) he didn't refer to *Redick* or other hearing loss cases as frequently as he and others referred to asbestos claims and (2) Senator Hatch's reference *could* be read as suggesting that the Board was wrong and could be corrected judicially. However, the one specific reference to *Redick* as being identical to and as unfair as asbestosis cases is exactly one more *specific* piece of evidence concerning Congress' intent than the Director identifies in support of his position.

> time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or *disability*. [Emphasis added.]

Congress employed the word "disability"[3] *three* times in §910(i). The first "disability" referenced in §910(i) is to the *claim* for disability which, in this case, is a claim for the disability that existed in 1983 as defined by a 1983 audiogram. The *third* disability referenced is to the employee's *awareness* of his disability which, in this case, is awareness of the disability that existed in 1983 as defined by the 1983 audiogram. Significantly, that "disability" is *not* the same "disability" as that which existed when the Employee retired in 1972 (See Pet. Br. 12).

The *second* "disability" referenced constitutes the statute's linchpin. The reference is to disease which does not immediately result in "disability". The Director takes this to mean *any* disability. However, if one reads the provision as a whole, and reads each "disability" as meaning the same thing, then the inescapable conclusion is that §910(i) applies to claims where the "disability" that is claimed, and of which the Employee becomes aware, is that which exists after retirement.

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[3] "Disability", for claims involving loss of hearing, is defined as "impairment" under the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. 33 U.S.C. §902(10), §908(c)(13)(E).



This reading of the statute is consistent with the rule of statutory construction that statutory language must be read in context, and that,

> "[i]n ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."

*McCarthy v. Bronson*, 500 U.S. ___, 114 L.Ed.2d 194, 111 S.Ct. 1737 (1991), citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811 (1988).

### 3. The Director Would Resurrect The Discredited "Last Exposure" Rule For Determining "Time of Injury".

The Director submits that the "time of injury" in this case must be 1972, or the date of last exposure (Dir. Br. 17). However, *before* the 1984 Amendments, the Courts confirmed that the "time of injury" is *not* the date of last exposure in claims involving occupational disease. See, *Castorina v. Lykes Bros. SS Co.*, 758 F.2d 1025, 1031 (5th Cir.), *cert. denied*, 474 U.S. 846, 106 S.Ct. 137 (1985); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1289-91 (9th Cir. 1983), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910 (1984). Further, as noted in Petitioners' opening brief, Congress in 1984 specifically chose to *reject* the date of last exposure as the "time of injury" for occupational disease cases. (Pet. Br. 16-19).

Finally, if the Director is correct, then the Act is *silent* as to the "time of injury" for calculating compensation for claims for occupational disease which *does* immediately cause death or disability. See, *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 1566-67 (11th Cir.

1991). While the Director points to the date of last exposure as the "time of injury", the Act certainly does not specify this and Congress appears to have rejected this date as the "time of injury". In short, the Director's argument that the date of last exposure is the "time of injury" is unsupported by the Act, contrary to Congress' express intent and inconsistent with established case law.

**4. The Director Is Entitled To No Deference.**

There exists considerable disagreement among the Circuits as to whether the Director's interpretation of the LHWCA is entitled to any deference. This Court has not addressed this question. See *Dir., Office of Wkrs. Comp. v. Gen. Dynamics Corp.*, 900 F.2d 506, 510 (2nd Cir. 1990).[4]

This Court addressed the general question of deference to an agency in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984). The first inquiry is whether Congress has directly addressed the issue in dispute. *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781. If Congressional intent is clear, the inquiry ends and the Court must give effect to this unambiguous intent. *Id.* Conversely, if Congress has not addressed the precise question at issue, the Court must ask whether the agency's interpretation is based on a permissible construction of the statute. *Id.* If so, the Court

[4] The First Circuit has not addressed this question, either in this case or elsewhere. While the First Circuit accepted the Director's argument, it did not do so because of "deference", although the Director briefed this argument before the First Circuit.



may not substitute its own construction of a statutory provision for a reasonable one made by an agency. *Id.*

Initially, BIW submits that the intent of Congress in this case is clear. Section 8(c)(23) applies notwithstanding §8(c)(13). Section 908(c)(23) applies because §910(i) applies, as that provision, read as a whole, confirms that the "disability" at issue did not immediately result since it did not exist until 1983. Therefore, this Court should not defer to the Director.

However, even if the statute is ambiguous, the Director's argument is entitled to no deference.

As noted, the Circuits are split on the question of deference to the Director in cases involving the LHWCA. Four Circuits appear to defer to the Director's interpretation of the Act where statutory provisions are ambiguous. *Newport News Shipbuilding & Dry Dock v. Howard*, 904 F.2d 206, 208 (4th Cir. 1990); *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1046 and n. 23 (5th Cir. 1982) (en banc), *cert. denied*, 459 U.S. 1170, 103 S.Ct. 815 (1983); *Peabody Coal Co. v. Blankenship*, 773 F.2d 173, 175 (7th Cir. 1985); *Force v. Director, OWCP, Dept. of Labor*, 938 F.2d 981, 983 (9th Cir. 1991).

Conversely, the Second and Third Circuits do *not* defer to the Director in such cases. *Dir., Office of Wkrs. Comp. v. Gen. Dynamics Corp.*, 900 F.2d 506, 510 (2nd Cir. 1990); *Director, Office of Wkrs.' Compensation v. O'Keefe*, 545 F.2d 337, 343 (3rd Cir. 1976). The Sixth Circuit deferred to the Director in *Saginaw Min. Co. v. Mazzulli*, 818 F.2d 1278, 1283 (6th Cir. 1987), but subsequently agreed with the Third Circuit that such deference is inappropriate. *Director, OWCP v. Detroit Harbor Terminals*, 850 F.2d 283, 287

(6th Cir. 1988); *American Ship Bldg. v. Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989).

BIW submits that the Third Circuit's rationale in *O'Keefe*, as recently adopted by the Second Circuit in *General Dynamics*, is most persuasive. The Second Circuit was persuaded by the observation that Congress had divided responsibility for administering the Act into *two* separate offices of the Department of Labor, the Board and the Director. The Court in *O'Keefe* noted that, while the Director *was* authorized by Congress to administer the statute, it is the ALJ and Board and not the Director who resolve disputed legal issues involving the Act. *O'Keefe, supra*, 545 F.2d at 343. The Court further observed that the Director brings no special expertise where, as here, statutory construction is at issue. *Id*; *General Dynamics, supra*, 900 F.2d at 510. Finally, the Second Circuit observed as follows:

> Further, when the Director appears as a litigant in an adversarial proceeding before the Board it is inappropriate to grant special deference to the Director's litigating position, particularly when that position has not been articulated in a more objective context through the promulgation of regulations. If deference were accorded under such circumstances, claimants would be effectively deprived of the right to impartial review.

*General Dynamics, supra*, 900 F.2d at 510. See also *Martin v. OSHRC*, 499 U.S. ___, 113 L.Ed.2d 117, 111 S.Ct. 1171 (1991) (no deference to agency's litigating position).



This conclusion is particularly compelling in this instance. The issue in this case does not concern a regulation promulgated by the Director, or the making of policy, or even a specific delegation of administrative discretion to the Director. See, e.g., *Martin v. OSHRC, supra*. Instead, the Director's argument is one that was adopted in litigation. It is premised upon a *medical* conclusion concerning hearing loss and a *legal* conclusion concerning Congressional intent. There is nothing about the Department of Labor's grant of power to the Director[5] to suggest that the Director brings any greater understanding or expertise concerning medical facts or legislative intent than does any other party to this proceeding.

The Director, however, submits that in promulgating 20 C.F.R. §702.212 he "clearly expressed his view that hearing loss is not subject to Section 8(c)(23)" (Dir. Br. 27). That rule affords 30 days or one year from the "date of injury" in which to provide notice. It is reproduced in the Director's Brief at App-4a.

It appears, however, that this rule merely implements the legislation that is the subject of the dispute. The rule confirms that the "date of injury" for a hearing loss claim occurs when the employee receives an audiogram. This is consistent with §908(c)(13). However, the provision

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[5] 33 U.S.C. §939(a) authorizes the Secretary of Labor to administer the Act and to make rules and regulations. 20 C.F.R. §701.202 transfers to the Director all functions of the Department of Labor with respect to the administration of benefits programs under the Act.

expressly applies only "[f]or other than occupational diseases described in (b)". Subsection (b), in turn, allows one year in which to give notice in claims for "occupational disease which does not immediately result in disability". Thus, like §912(a), the Director's regulation affords a longer notice period (one year versus thirty days) for retired employees with diseases that do not immediately result in "disability". Hearing loss *may* be such a disease where an employee remains unaware of his disability or its work-relatedness until after retirement. Thus, the intent of the Director appears to be every bit as clear as that of Congress.

Finally, even if the Director's argument is otherwise entitled to deference, it should be rejected in this case because it is not based upon a reasonable construction of the Act. The Director's solution is contrary to Congress' intent and is premised upon an unreasonable construction of the Act.



## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the decree issued by the First Circuit be reversed and the matter remanded to calculate benefits under Section 908(c)(23).

Respectfully submitted,

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